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No. 05-1272

In the Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

PETITIONERS,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA *EX REL.* JAMES S. STONE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT JAMES S. STONE

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QUESTION PRESENTED

Whether the Court should affirm the decision of the Court of Appeals affirming the district court's findings in this 17 year-old case that the *qui tam* relator is an "original source" under the plain language of the False Claims Act, 31 U.S.C. § 3730(e)(4).

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BRIEF FOR RESPONDENT JAMES S. STONE

Respondent James S. Stone respectfully requests that the Court affirm the judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

Respondent James S. Stone, an 81-year-old retired Rockwell engineer, commenced this action in July 1989 under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA"), alleging that Rockwell had made false statements to the Government in connection with its environmental, safety and health ("ES&H") activities at the Rocky Flats nuclear weapons facility outside Denver, Colorado ("Rocky Flats" or "the Plant"). Pet. App. 4-5a.[1] Since filing suit over 17 years ago, Mr. Stone has proven his status as a proper *qui tam* relator time and time again in the courts below, the United States agrees that Mr. Stone is an original source, and in 1999 the United States and Mr. Stone jointly tried this case to a jury, which found that Rockwell had violated the FCA as Mr. Stone had alleged for years. Mr. Stone is an original source.

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[1] Citations to the parties' Joint Appendix are denoted as "JA". Citations to the appendix Rockwell submitted with its certiorari petition are denoted as "Pet. App.". Citations to Rockwell's Appendix before the Tenth Circuit are denoted as "CA App." and references to the trial transcripts in Volumes VII through IX therein are denoted as "Tr.". Citations to Mr. Stone's Supplemental Appendix before the Tenth Circuit are denoted as "SA".

Mr. Stone Is a Paradigmatic Whistleblower. Beginning in 1986, long before any of the ES&H problems at Rocky Flats had been made public, Mr. Stone voluntarily approached the Government. In a series of meetings with Federal Bureau of Investigation ("FBI") and Environmental Protection Agency ("EPA") agents and an Assistant United States Attorney, Mr. Stone provided his direct and independent knowledge of Rockwell's environmental violations and fraud at the Plant, where he had worked for nearly six years. JA 170, 180-82, 250-67, 599-600, 615-21; CA App. 729-30. The ensuing criminal investigation confirmed Mr. Stone's allegation that Rockwell was violating environmental laws on a massive scale, and a jury subsequently confirmed Mr. Stone's allegation that Rockwell also had committed fraud.

Mr. Stone substantially contributed to the criminal prosecution of Rockwell and indisputably spearheaded this FCA action. In July 1989, after his discussions with the Government had concluded, and shortly after the FBI raided Rocky Flats, Mr. Stone initiated this FCA action. JA 38. He litigated the case alone, on the Government's and his own behalf, until the Government intervened in 1996. *Id.* 382-88. Because of the joint efforts of Mr. Stone and the Government, in 1999, a Denver jury found Rockwell liable under the FCA for $4,172,327.40 (trebled). Pet. App. 10a, 68a.

Mr. Stone Learned of Rockwell's Fraud Through His Employment at Rocky Flats. With 30 years of engineering experience and several patented inventions, Mr. Stone was employed by Rockwell at Rocky Flats from November 1980 through March 1986. Pet. App. 3a, 17a; JA 170. Given his broad and lengthy experience, Mr. Stone's job for Rockwell consisted of plant-wide "troubleshooting" to identify and devise solutions to problems, including those arising in Rockwell's ES&H operations. Pet. App. 17-18a; JA 170. Projects to which Mr. Stone was assigned at Rocky Flats included waste treatment through a cementation process used to remove and solidify pond sludge and salt wastes to produce

"pondcrete" and "saltcrete," sewage treatment plant operations, the spray irrigation wastewater disposal system, and plutonium processing and beryllium machining operations. Pet. App. 18a; JA 171-79. While working on these projects, Mr. Stone observed serious ES&H problems in each of these areas. Pet. App. 18a; JA 174-76, 228, 289-90 (pondcrete/saltcrete); *id.* 171-72 (sewage treatment plant); *id.* 172-74, 224-25 (spray irrigation); *id.* 176-78 (plutonium); *id.* 178-79 (beryllium); *id.* 181-82 (observations made first-hand).

Mr. Stone also knew that Rockwell was being paid under its contract based on false claims. Mr. Stone knew that Rockwell's profits for its operation of the Plant consisted principally of award fee bonuses, and during his employment Mr. Stone learned that those bonuses were based on Rockwell's satisfactory performance in various ES&H areas, including "Waste Management," and that Rockwell was required to report ES&H problems to the Department of Energy ("DOE"). JA 179-80, 247-49. Although Mr. Stone reported ES&H problems he observed to Rockwell management, he and other Rockwell employees were specifically instructed not to discuss those problems with DOE. *Id.* 180, 280. As Mr. Stone has alleged from the beginning, and as the jury ultimately found, Rockwell concealed ES&H problems from DOE. Consistent with Mr. Stone's contention from the start, the jury's verdict, before trebling, represented 10% of the award fees Rockwell received during the period for which the jury found liability, which corresponded to the weight DOE gave Waste Management in its award fee evaluations. Tr. 2865.

Mr. Stone Reported His Allegations to the Government. In the years following the termination of his employment by Rockwell in March 1986, and *before* any of the ES&H problems at Rocky Flats had been made public, Mr. Stone voluntarily approached the Government. JA 180-81, 250-67, 599-600, 615-21; CA App. 729-30. In a series of meetings over a two-year period, Mr. Stone reported the ES&H problems he had observed at Rocky Flats, including problems with

pondcrete and spray irrigation, and information regarding the award fee process; turned over 2,300 pages of related documents from the Plant; and advised the Government regarding sources of additional information and documents. JA 180-81, 257-58, 264. He described the danger of contamination posed by Rockwell's use of spray irrigation and he told the Government about Rockwell's practice of discharging untreated hazardous waste. *Id.* 252-53, 601, 616. He also discussed the faulty design and implementation of the pondcrete production system. *Id.* 600-01, 615-16. Mr. Stone also told the Government that Rocky Flats employees were not permitted to discuss such problems with DOE. *Id.* 251, 258. And, he discussed Rockwell's submission of false claims for award fees. *Id.* 616-17.

Among the documents Mr. Stone provided to the Government before any public disclosure was an October 13, 1982 Engineering Order in which he stated, with respect to the manufacturing process for pondcrete: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation . . . ." Pet. App. 51a; JA 228. As the Tenth Circuit would later find, this Engineering Order "was explicit in articulating his belief that the proposed design for making pondcrete was flawed . . . . Despite this warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure." Pet. App. 18a. In addition, Mr. Stone provided the Government with a document discussing the award fee process and specifically linking Rockwell's compensation to environmental protection. JA 247-48.

Mr. Stone also turned over an eight-page Engineering Calculation Sheet he wrote on the subject of "nitrate waste irrigation," which was based on his direct observation of the faulty spray irrigation system at Rocky Flats, CA App. 430-37, JA 224-25, as well as a 1984 memorandum in which Mr. Stone described the spray irrigation process as a "latent time bomb." JA 227. Mr. Stone also provided the Government with a copy

of his 1986 state court wrongful discharge complaint, which discussed his concerns about spray irrigation. *Id.* 250, 270.

The Government Investigation. In June 1989, the FBI and EPA executed a search warrant at Rocky Flats based on information provided by Mr. Stone. Pet. App. 4a; Pet. Br. 4.[2] The search warrant was supported by an affidavit signed by Agent Jon Lipsky, the same FBI agent with whom Mr. Stone had met beginning in 1986, and included sections concerning pondcrete and spray irrigation. JA 429, CA App. 152.[3]

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[2] Rockwell wrongly asserts that a 1992 "statement" by the U.S. Attorney announcing the plea agreement, that no "knowledgeable 'insider' c[a]me forward to identify serious environmental criminal conduct," negates Mr. Stone's direct and independent knowledge. JA 343. By that time, Mr. Stone no longer was employed at Rockwell and thus was not then an "insider." Perhaps more to the point, the United States consistently has stated in this case that Mr. Stone is an original source. *E.g.*, JA 571. Likewise, Rockwell's reliance on hearsay for the proposition that Mr. Stone is not an original source is misplaced. As an example, Rockwell refers to statements of Congresswoman Pat Schroeder, yet omits that she actually hailed Mr. Stone as a "hero" for his efforts. JA 344.

[3] Rockwell incorrectly contends that the FBI did not commence its investigation of pondcrete until FBI agents observed pondcrete blocks during their search in June 1989; indeed, this contention is inconsistent with Rockwell's other erroneous contention that Mr. Stone "copied" his pondcrete allegations from the affidavit Agent Lipsky submitted to procure the warrant for that very search. Pet. Br. 5. The truth is that Mr. Stone provided his knowledge about Rockwell's flawed pondcrete manufacturing process to the Government well before June 1989, JA 180-82, 228, 599-601, and that, as Rockwell concedes, the affidavit Agent Lipsky prepared to obtain the search warrant was based in part on information from Mr. Stone, Pet. Br. 4.

On March 26, 1992, Rockwell entered into a plea agreement with the Justice Department's Criminal Division under which it pled guilty to ten environmental crimes and agreed to pay $18.5 million in criminal fines. JA 50-72; Pet. App. 6-7a. Rockwell pled guilty to "illegal storage" and "illegal treatment" of pondcrete and saltcrete in violation of the Resource Conservation and Recovery Act. JA 53-57. Rockwell also pled guilty to "knowingly violating conditions and limitations in Rocky Flats'" National Pollutant Discharge Elimination System ("NPDES") permit, "by 'spray irrigating' water from Pond B-3 contrary to good engineering practices and in such a manner as to bypass Rocky Flats facilities which were necessary to maintain compliance with the plant's NPDES permit." *Id.* 63-65. Significantly, the release in the plea agreement specifically excluded Mr. Stone's FCA action and left open the possibility (which later occurred) that the Government would intervene in that action. *Id.* 70, 358-61.

Mr. Stone's FCA Action. Almost simultaneously with the Government's search of Rocky Flats (and years after he first approached the Government), Mr. Stone commenced this action in July 1989 alleging that Rockwell had fraudulently misrepresented the status of its ES&H performance to the Government in order to induce payments under its DOE contract. JA 38, 43-46.[4] As required by the FCA, Mr. Stone's complaint was filed under seal and thus was not served on Rockwell at that time, and Mr. Stone provided his complaint and a lengthy disclosure statement to the Government outlining additional information underlying his allegations, including

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[4] Well before the search warrant or any public disclosure, Mr. Stone informed the agents with whom he had met that he intended to file an FCA action. JA 301, 617-18.

information specifically relating to pondcrete and spray irrigation. JA 182-83; CA App. 491-561, JA 276-303.

Rockwell's Unsuccessful Motion to Dismiss. In late 1992, Rockwell moved to dismiss Mr. Stone's action under the direct and independent knowledge prong of the original source provision, arguing that Mr. Stone did not identify the specific documents containing the false claims or statements and the persons who submitted them. JA 73-93. Rockwell did not contest (nor could it) that Mr. Stone voluntarily provided his information to the Government prior to his filing suit.

In response, Mr. Stone submitted a lengthy sworn affidavit with attachments explaining his knowledge gained as a principal engineer for Rockwell of ES&H problems at the Plant, including those relating to pondcrete, spray irrigation, sewage treatment, plutonium and beryllium operations, which he reported to Rockwell management, JA 170-79, 184-246, and explaining that Rockwell's award fee bonuses were determined by its performance in various areas, including ES&H matters, *id.* 179-80, 247-49. Mr. Stone further explained that he provided this information to the FBI and EPA before he filed this FCA suit. *Id.* 180-82, 250-67.[5]

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[5] Significantly, though Rockwell seeks now to take back its statements, in its reply brief on the motion to dismiss it acknowledged Mr. Stone's direct and independent knowledge of pondcrete and spray irrigation: "At best, Stone had first-hand knowledge (for example) that Rockwell's use of spray irrigation likely caused surface and ground water contamination [and] that the pondcrete Rockwell was manufacturing would eventually deteriorate and release toxins into the environment . . . ." CA App. 578 (citations omitted); *id.* 567 ("Stone's assertion that he told the FBI/EPA about ES&H 'problems' at Rocky Flats is, on the other hand, accurate.").

On February 2, 1994, the district court denied Rockwell's motion to dismiss. The court found, based on the factual record submitted, that Mr. Stone (i) had first-hand knowledge of ES&H problems acquired through his role as plant troubleshooter, (ii) knew that Rockwell's compensation was based on its compliance with ES&H standards, (iii) knew that Rockwell's compensation would be adversely affected if it did not perform in these areas, and (iv) was instructed by Rockwell management not to divulge ES&H problems to DOE. Pet. App. 61a. Thus, the court found, "Mr. Stone had direct and independent knowledge that Rockwell's compensation was linked to its compliance with environmental, health and safety regulations and that it allegedly concealed its deficient performance so that it would continue to receive payments." *Id.* Rockwell never sought reconsideration of the district court's decision in the ensuing five years before trial.

Government Intervention. In late 1995, the Government moved to intervene in this action, explaining that it had obtained information through a separate proceeding[6] as well as material submitted to the Government by Mr. Stone confirming Mr. Stone's FCA allegations and, in particular, those concerning Rockwell's misrepresentations as to pondcrete, saltcrete and spray irrigation. JA 347, 352.[7]

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[6] After Rockwell was dismissed as contractor at Rocky Flats, Rockwell sued the United States in the Court of Federal Claims, and the Government has defended on the ground, among others, that Rockwell committed fraud. JA 350-51.

[7] Rockwell opposed Government intervention and, in the criminal case, moved to enforce a provision of the plea agreement that it contended prevented the Government from intervening in this action. Holding that the Government's intervention did not breach the plea agreement, the district court denied the motion, and the Tenth Circuit affirmed.

Finding good cause, the district court granted the motion, and that ruling is not challenged here. Pet. App. 8a; JA 382-88.[8]

At the district court's request, Mr. Stone and the Government jointly filed an Amended Complaint on December 20, 1996, alleging, in Count One, FCA violations in connection with Rockwell's pondcrete, saltcrete and spray irrigation waste treatment operations. JA 394, 401-17. These claims had been in the case from its inception. The Government alleged additional common law claims, and Mr. Stone separately alleged FCA claims relating to Rockwell's plutonium and beryllium operations. *Id.* 417-23.[9] At no time before trial did

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See United States v. *Rockwell Int'l Corp.*, 124 F.3d 1194 (10th Cir. 1997), *cert. denied*, 523 U.S. 1093 (1998).

[8] The grand jury investigation proceeded for several years after Mr. Stone filed suit, complicating discovery proceedings. The Government initially deferred deciding whether to intervene when Justice Department "prosecutors expressed concerns . . . that any duplicative investigation by DOJ-Civil might interfere with their ongoing efforts." JA 356-57. Rockwell's claim that the Government declined to intervene at that point because it "felt that Stone lacked sufficient information to sustain his FCA claims" is just wrong. Pet. Br. 7. Indeed, when the Government did move to intervene in 1995, it informed the district court that its decision was based in part on information provided by Mr. Stone, and the Government then adopted Mr. Stone's existing pondcrete, saltcrete and spray irrigation claims. JA 352.

[9] Mr. Stone later withdrew his beryllium claim, and the plutonium claim was severed by the district court and has not been tried. Pet App. 8-9a; CA App. 1618-21. Following trial on the pondcrete, saltcrete and spray irrigation claims, the district court entered judgment pursuant to Fed. R. Civ. P. 54(b). Pet. App. 68a.

Rockwell seek dismissal of the Amended Complaint, nor did it seek to limit Mr. Stone's participation in the case.

Specifically, in the Amended Complaint, plaintiffs jointly alleged that, due to defective design and manufacturing, a substantial number of the pondcrete and saltcrete blocks Rockwell manufactured and stored outdoors were unstable and, as a result, hazardous materials leached onto the pads and the surrounding environment. JA 404, 406, 463-90. With respect to spray irrigation, plaintiffs alleged that Rockwell improperly disposed of wastewater by spraying it on the fields surrounding Rocky Flats, thereby polluting Woman Creek and other nearby water supplies. *Id.* 409-12, 490-93. Plaintiffs contended that Rockwell failed to report these environmental conditions to the Government, resulting in the fraudulent receipt of award fees under Rockwell's DOE contract. *Id.* 414-15. As in all cases, these claims – which Mr. Stone had pursued from the case's inception – were further detailed in the extensive discovery proceedings and summarized in the final pre-trial order. *Id.* 463-93.[10]

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[10] To avoid jury confusion over different sets of jury instructions, plaintiffs decided before trial to limit their damages claims to award fee periods beginning in 1986 and to narrow the evidence on spray irrigation to focus on Rockwell's contamination of Woman Creek in January 1987. CA App. 1104-09. Also before trial, Rockwell proposed prejudicial jury instructions on Mr. Stone's entitlement to up to 25% of the judgment and on Mr. Stone's dismissed retaliation claim, which Mr. Stone opposed. JA 447-56. Ultimately, the trial court approved a stipulation "regarding the agreement of no reference to Mr. Stone and the role of the relator beyond that which is already in the jury questionnaire giving the statement of the case," SA 108, and Mr. Stone did not testify. Such strategic decisions by counsel cannot be used (as Rockwell seeks now to do) to undermine a relator's original source

Trial. Plaintiffs' pondcrete, saltcrete and spray irrigation claims were presented jointly by Mr. Stone and the United States during a six-week trial. Lawyers for Mr. Stone and the Government cooperated fully in prosecuting the case. On April 1, 1999, the jury returned a verdict finding that Rockwell made false statements in violation of the FCA for the three six-month award fee periods from April 1, 1987 through September 30, 1988. JA 548-49. The jury awarded damages in the amount of $1,390,775.80, which, under the treble damage provision of the FCA, resulted in a final judgment of $4,172,327.40. Pet. App. 10a, 68a.[11]

Rockwell's Post-Judgment Challenge to Mr. Stone's Participation in the Judgment. After the jury rendered its verdict, without any proper procedural vehicle in which to do so, Rockwell sought to reargue the district court's prior original source ruling by contesting entry of judgment in favor of Mr. Stone. CA App. 1135-54. The Government agreed with Mr. Stone that the district court's 1994 original source ruling was correct and should not be revisited. JA 568-71. The Government also stated that it did not question Mr. Stone's

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status. Indeed, as noted, at no time after Government intervention through trial did Rockwell seek dismissal of Mr. Stone from the case.

[11] The jury assessed damages by awarding a single, aggregate figure that was not broken down by award fee period. JA 548-49. The jury also was not asked to make any specific findings with regard to pondcrete, saltcrete or spray irrigation. The jury's award of $1,390,755.80 (before trebling) is exactly 10% of the total award fee bonus that Rockwell received from October 1, 1986 to September 30, 1989, corresponding with the 10% weight DOE gave to "Waste Management." Pet. App. 30a. The jury rejected plaintiffs' request for additional damages incurred by the United States to repair the environment as a result of Rockwell's illegal waste disposal practices.

proper status as a *qui tam* plaintiff and that "the question of whether a particular relator is or is not an 'original source' is one which affects the government's interests." *Id.* 571. The district court denied Rockwell's motion and entered final judgment on May 13, 1999. Pet. App. 66-68a, JA 29.[12]

Appeal. Rockwell appealed on various grounds, including the original source issue, and cross-appeals were filed by plaintiffs on damages. The Government also appealed from the dismissal of its common law claims.

On September 24, 2001, in an opinion authored by Judge Holloway, a Tenth Circuit panel majority affirmed the district court's rulings in their entirety. The Court of Appeals held that the district court had correctly determined that Mr. Stone was an original source because he had direct and independent knowledge of the allegations underlying his claims. The court specifically held that Mr. Stone's observation in his 1982 Engineering Order that the pondcrete process would not work, among other record evidence, constituted direct and independent knowledge of the pondcrete claim as to which Rockwell was found liable. Pet. App. 17-20a.

Judge Briscoe dissented. The dissent did not take issue with the panel majority's articulation of the direct and independent knowledge requirement, but rather with the majority's application of the law to the facts of this case. Pet. App. 44-48a.

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[12] Rockwell also raised post-trial a claim that the FCA's *qui tam* provisions are unconstitutional. CA App. 1459-71. The district court denied that request, Pet App. 67a, and this Court has denied review.

On November 2, 2001, Rockwell sought rehearing and rehearing *en banc*, arguing that there was an *intra*-circuit split as to the original source issue. JA 4. On March 4, 2002, the Tenth Circuit reaffirmed its ruling that Mr. Stone had direct and independent knowledge of the information on which his allegations were based, and directed a limited remand on whether Mr. Stone had satisfied the second prong, *i.e.*, whether he voluntarily provided his information to the Government before filing this FCA action. Pet. App. 15-23a, 43-44a. The suggestion for rehearing *en banc* was denied. *Id.* 1a.

Limited Remand. On December 17, 2002, the district court issued an order finding that Mr. Stone provided to the Government documents relevant to the ES&H matters at issue, including his Engineering Order related to pondcrete, prior to bringing this suit. Pet. App. 73a.[13]

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[13] At oral argument before the district court on limited remand, the court indicated that it was rejecting Rockwell's position that negative inferences could be drawn from FBI 302 reports about whether Mr. Stone communicated his concerns about pondcrete in his meetings with the FBI. JA 594-95. In its written decision, however, the district court changed course, observing that it is "fair to infer that if Mr. Stone attached such importance to the potential for the leakage of toxic materials from the pondcrete blocks, . . . there would be some reference to it in the agent's reports." Pet. App. 74a. Mr. Stone subsequently filed a motion for reconsideration in order to submit affidavits from Mr. Stone and his counsel that made clear that pondcrete was indeed discussed at these meetings. JA 591-98. The district court denied the motion. JA 624-25. The Tenth Circuit correctly rejected the district court's finding with respect to the 302 reports, Pet. App. 52a, and denied as moot Mr. Stone's motion to supplement the record. The additional affidavits, which Rockwell ignores, confirm that Mr. Stone discussed both pondcrete and spray irrigation in the 1986-88 meetings with the Government. JA 181-82, 599-601, 615-21.

On March 5, 2004, the Tenth Circuit reaffirmed the judgment of the district court in all respects as set forth in its previous opinion. Pet. App. 52-53a. The Court of Appeals specifically held that by providing the Government with his Engineering Order, Mr. Stone satisfied the second prong of the original source test requiring the relator to provide his information voluntarily.[14] *Id.* 52a. Judge Briscoe again dissented, for the same reasons as in her prior dissent. *Id.* 53-55a.

On April 16, 2004, Rockwell filed another petition for rehearing and rehearing *en banc*, contending that the Tenth Circuit's decision presented an *intra*-circuit conflict as to the second prong of the original source test. On January 4, 2006, the Tenth Circuit denied Rockwell's second petition. Pet. App. 57a. This Court subsequently granted certiorari.

SUMMARY OF ARGUMENT

The False Claims Act plainly states that to be an "original source" a relator must have direct and independent knowledge of the information on which the allegations in his complaint are based, and he must have disclosed that information to the Government prior to filing suit. Rockwell's proposed extra-textual standard would require relators to have first-hand knowledge of the particular pieces of paper containing the false statements *and* the evidence introduced at trial that proves the claim to a jury (as divined from the jury verdict). Rockwell's standard is utterly divorced from the plain language of the statute and its history.

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[14] Because the Tenth Circuit held that Mr. Stone was an original source of his pondcrete allegations, its statement that Mr. Stone's knowledge of spray irrigation was "moot" is *dicta*. Pet App. 50a.

The FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), prohibits only strictly parasitic lawsuits by barring actions based on allegations or transactions that were previously publicly disclosed unless *either* the Government intervenes "or" the relator is an original source. Here, both exceptions are met: Mr. Stone is an original source, as the district court (twice) and the Court of Appeals (twice) have held, and the Government intervened in the action. Rockwell, ignoring the disjunctive nature of the bar's two exceptions, argues that even after the Government's intervention, and even after the relator has already been held to be an original source, the original source provision can be revisited again and again at any time. This interpretation is wrong: once a relator has been determined to be an original source and the Government intervenes, there is no reason to revisit that determination. To do so would be contrary to the language and purpose of the original source provision.

Regardless, Mr. Stone is an original source. The plain language of the original source definition, 31 U.S.C. § 3730(e)(4)(B), requires a relator to have direct and independent knowledge of the information on which his allegations are based, and to have disclosed that information to the Government prior to filing suit. Rockwell asserts that "the text of the statute and governing canons of construction do not permit" the Tenth Circuit's interpretation, Pet. Br. 26, but then proceeds to apply an extra-statutory gloss on each aspect of the original source definition that cites neither the plain language nor a single canon of construction. It argues that "direct" knowledge cannot include knowledge gained through the use of inference, that "information on which the allegations are based" must mean the evidence introduced at trial that establishes both the false statement and the true state of facts, and, despite a conceded lack of basis in the plain text, that there should be a new requirement that the significance or quantum of information meet a certain threshold. Each of these arguments is not only unsupported, but actually contradicted, by the text of the statute.

Mr. Stone is an original source. Over the five and a half years he worked as an engineer at Rocky Flats, Mr. Stone learned that Rockwell knowingly hid ES&H violations in order to continue receiving award fee bonuses from the Government. He learned through first-hand observation that Rockwell's process for manufacturing pondcrete was flawed, that its use of spray irrigation posed a danger of environmental contamination, that Rockwell instructed its employees, including Mr. Stone, not to discuss its environmental violations with DOE personnel, and that the award fees Rockwell received were paid based in part on its asserted environmental compliance. This is the information underlying and supporting the allegations in Mr. Stone's complaint, and this is the information Mr. Stone voluntarily provided to the Government in a series of meetings he initiated three years *before* he filed suit. Under *any* standard, Mr. Stone is an original source. The decisions below should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AFFIRMANCE

The plain language of the *qui tam* provisions of the False Claims Act makes clear that to be an "original source" a relator must have first-hand knowledge of the *information* on which the *allegations* in his complaint are based, and he must have disclosed that information to the Government prior to filing suit. Rockwell repeatedly insists that its contrary interpretation of the original source provision is "faithful to the text." Pet. Br. 25, 32. It is not. The standard Rockwell asks this Court to adopt – that the relator must have direct and independent knowledge of the particular evidence introduced at

trial that establishes both the false statement and the true state of facts – is both unmoored from and contrary to the plain language of the *qui tam* provisions of the FCA, as well as their structure, purpose and history.[15]

A. The Original Source Provision and the Plain Meaning of "Direct and Independent Knowledge"

The FCA's *qui tam* provisions, 31 U.S.C. § 3730(b)-(g), "empower private persons, known as 'relators,' (1) to sue, on behalf of the government, persons who knowingly have presented the government with false or fraudulent claims (as . . . defined by 31 U.S.C. § 3729); and (2) to share in any proceeds ultimately recovered as a result of such suits, *see generally* 31 U.S.C. § 3730(d)." *United States ex rel. S. Prawer and Co.* v. *Fleet Bank of Me.*, 24 F.3d 320, 324 (1st Cir. 1994) (emphasis omitted). To accomplish the statute's purpose of empowering private persons to come forward, the statute provides that a successful relator is entitled to a portion of the recovery – up to 30% – and to costs and attorneys' fees. *Id.* § 3730(d). *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("'[O]ne of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions

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[15] Rockwell relies on public disclosure in order to trigger the original source requirement, yet the level of detail in the news articles on which Rockwell relies does not include the trial evidence that Rockwell now contends Mr. Stone must have possessed when he filed this suit. Rockwell cannot have it both ways. Were this Court to adopt Rockwell's original source standard, additional inquiry would be necessary as to whether the original source provision is even triggered in this case.

by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain.'") (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943)).

Section 3730(e) of the FCA sets forth four types of actions that, in certain circumstances, are barred. The bar at issue in this case states as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

Subsection (e)(4)(A) prohibits what are commonly referred to as "parasitic" lawsuits, by barring those suits where the allegations or transactions have been publicly disclosed, with two important exceptions separated by the disjunctive "or." *See Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive . . . be given separate meanings.") (citing *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739-40 (1978)); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).

The first exception, which arises when "the action is brought by the Attorney General," applies here because the Government intervened in 1996, thus rendering the public disclosure bar inoperative.[16] *See infra*, pp. 26-27. The second exception, which Mr. Stone also satisfies but need not even be addressed given the Government's intervention, arises where "the person bringing the action is an original source." Subsection (e)(4)(B) defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

The "direct and independent" knowledge requirement is clear on its face and should be given its plain meaning. "Direct" knowledge is "knowledge derived from the source without interruption *or* gained by the relator's own efforts rather than learned second-hand through the efforts of others." *United States ex rel. Laird* v. *Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 355 (5th Cir. 2003) (citing Webster's New International Dictionary 640 (3d ed. 1961)) (emphasis added). *See also United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994) (defining direct knowledge as knowledge "marked by absence of an intervening agency") (citation omitted). "'Independent

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[16] Senator Grassley, the chief Senate sponsor of the 1986 amendments, makes this very point in his *amicus* brief. After all, it is the Government's interests that are to be protected by the public disclosure bar. Thus, upon intervening, the Government can limit the relator's participation by availing itself of the range of tools it is provided in § 3730(c)(2).

knowledge' is knowledge that is not itself dependent on public disclosure." *Id.* (citation omitted).[17]

Thus, for the "direct and independent" knowledge requirement to be met, the relator must have first-hand knowledge that was gained independently of the public disclosure. Here, as we show further below, Mr. Stone, who developed his knowledge of Rockwell's fraud directly and independently during the course of his employment, easily satisfies the original source requirement.[18]

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[17] The Tenth Circuit describes "independent" slightly differently: "independent knowledge means that 'the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources.'" Pet. App. 15a (citation omitted). This variation has no impact on this case, as Mr. Stone's knowledge is based on his personal observations of Rockwell's ES&H practices while he was employed at Rocky Flats. JA 289-90, JA 270.

[18] The archetypal *qui tam* plaintiff – a whistle-blowing employee – generally satisfies the direct and independent knowledge requirement by virtue of his first-hand knowledge of the defendant's operations. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.* v. *Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991). Other relators who develop evidence of fraud through their own investigative efforts likewise can possess direct and independent knowledge but must do so through the work they put into uncovering and exposing the fraud. *See, e.g., Kennard* v. *Comstock Res., Inc.*, 363 F.3d 1039, 1046 (10th Cir. 2004). Mr. Stone satisfies either interpretation. Rockwell's proposed standard would bar almost all plaintiffs, despite their very real contributions to the Government's enforcement of the FCA.

B. The Statute Clearly Provides That the Direct and Independent Knowledge an Original Source Must Have Is "Information on Which the Allegations Are Based"

The statute provides that the direct and independent knowledge a *qui tam* relator must have is knowledge "of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). As the Tenth Circuit held, this means that a plaintiff must show that he has direct and independent knowledge of the information "underlying or supporting" the allegations of his complaint. Pet. App. 21a (citation omitted); *see also Springfield*, 14 F.3d at 656 ("Significantly, the 'original source' provision requires the relator to possess direct and independent knowledge of the 'information' *underlying* the allegation, rather than direct and independent knowledge of the 'transaction' itself.") (emphasis added). Contrary to Rockwell's contention, the Tenth Circuit did not "merely require[] relators to know some background facts 'underlying or supporting' the 'fraud allegations contained in the plaintiff's *qui tam* complaint.'" Pet. Br. 13. It simply held, consistent with the plain text of the statute, that the relator must have direct and independent knowledge of "the information underlying or supporting the fraud allegations contained in the plaintiff's *qui tam* complaint." Pet. App. 21a.

Mr. Stone and Rockwell agree that the information in question is the information underlying the relator's complaint, rather than the publicly disclosed information. Pet. Br. 26 n.13. *See United States ex rel. Mistick PBT* v. *Hous. Auth. of Pittsburgh*, 186 F.3d 376, 389 (3d. Cir. 1999) (Alito, J.); *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). Yet, Rockwell seeks to go further, arguing that the plaintiff must have knowledge of every element of a claim, or that the trial evidence and jury verdict retroactively may negate a relator's "knowledge of the information on which the allegations are based." Rockwell is wrong.

Indeed, contrary to Rockwell's position, it is clear from the statutory text that "the information" is not "the allegations" and also that "the information" is not the evidence introduced at trial or the jury verdict. Congress could have chosen to require an original source to have direct and independent knowledge of "the allegations," but it did not. Congress also easily could have used the word "evidence," but, again, it did not. *See Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that the starting point in every case involving construction of a statute is the language itself.") (citations omitted). Congress instead chose the words "information on which the allegations are based," which cannot mean evidence or even knowledge of every factual allegation necessary to proceed with an action. Moreover, Congress separated the words "information" and "allegations" and the phrase "are based" ensures that that distance is limited – *i.e.*, "the information" is not *any* information but rather the information "on which the allegations are based."

Finally, "allegations" in subparagraph (B) must refer to the allegations in the *qui tam* complaint. *See* Pet. App. 21a (citing *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999)); *Mistick*, 186 F.3d at 388-89. Rockwell seems to agree. *See* Pet. Br. 26 n.13.

C. Rockwell's Position as to What "Information" a Relator Must Possess To Be an Original Source Is Contrary to the Plain Language of the Statute

Rockwell departs from the statute's plain language when it asserts that "direct" knowledge cannot include "inferences." Pet. Br. at 31. As Rockwell concedes, "direct" simply means "first-hand" – that is, "obtained . . . through his own efforts, not through the efforts of others." *Id.* at 30. Clearly, such first-hand knowledge may include reasonable inferences deduced from one's first-hand knowledge. The case law draws no distinction between inferences, deductions and other types of direct knowledge. *See Minn. Ass'n of Nurse Anesthetists* v. *Allina Health Sys. Corp.*, 276 F.3d 1032, 1050

(8th Cir. 2002) (holding that plaintiff nurse-anesthetists' personal observation of anesthesiologists filling out forms used for billing with misleading information "would support an inference that the anesthesiologist[s] submitted false bills"); *Kennard*, 363 F.3d at 1046 ("It was only through independent investigation, deduction, and effort that Relators discovered the alleged fraud."); *see also United States* v. *Joy*, 192 F.3d 761, 767 (7th Cir. 1999) ("Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences."). And there is no reason to draw such a distinction here.

Rockwell also departs from the statute's plain language when it argues that "'the information' that § 3730(e)(4) puts at issue is, most logically, the information that the relator relies upon to establish his allegation of fraud." Pet. Br. 26. Indeed, pervasive throughout Rockwell's brief is the assumption – which finds no support in the text of the statute – that the original source provision has to do with the *evidence* used to "establish" an FCA claim. By its terms, the original source provision is clearly concerned with what is *alleged* in the relator's complaint. *See* Black's Law Dictionary 81 (8th ed. 2004) (defining an "allegation" as a "formal statement of a factual matter as being true or probable, *without its having yet been proved*") (emphasis added).[19] And, even then, the

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[19] That a court must assess the complaint's allegations does not mean it may not consider other evidence. Indeed, in ruling on Rockwell's motion to dismiss, the district court considered Mr Stone's affidavit with attachments and his confidential disclosure statement, in addition to material submitted by Rockwell. Rockwell does not contest the propriety of the district court having done so. But none of this means that a court may rewrite the statute's use of "allegations" to mean trial evidence.

provision is concerned not with the relator's knowledge of the allegations *per se*, but of the *information* on which the allegations are based. The *evidence* that a plaintiff (or, more likely, his counsel) later decides to introduce at trial to "establish his allegation of fraud" reflects the development of the case in discovery and tactical decisions made to present the case to a jury. It has no relevance to the question of whether the relator is an original source as to his *allegations*.[20]

Simply put, if accepted, Rockwell's position would require the Court to rewrite the statute and add words that Congress did not include. The Court declined to do just that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), and

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[20] Rockwell's argument that the word "basis" in the Foreign Sovereign Immunities Act somehow means that the original source provision requires knowledge of evidence of fraud is without merit. Pet. Br. 26-27. The case Rockwell uses to construct this theory, *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), addresses exceptions to a wholly different statute, which provides that foreign states shall not be immune "in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605 (a)(2). There, the Court held that commercial activities unrelated to the personal injury claim were insufficient to satisfy the statutory exception, which reflects the plain language of that statute. *Nelson*, 507 U.S. at 351, 357-58. In any event, the use of the phrase "based upon" in § 1605(a)(2) is analogous to the use of the phrase "an action under this section based upon" in subparagraph (A) of the public disclosure bar, 31 U.S.C. § 3730(e)(4), *not* to the use of the phrase "allegations are based" in the original source definition in subparagraph (B). In subparagraph (B), Congress required relators to have "direct and independent knowledge of the information on which the allegations are based," *not* "allegations based upon direct and independent knowledge" or "direct and independent knowledge of the basis of the action."

it similarly should decline to do so here. The plaintiff in *Hess* brought suit under the original version of the FCA based *entirely* on information he had copied from a criminal indictment; the defendants and the Government (participating as *amicus curiae*) challenged his relator status, arguing that Congress did not intend to allow strictly parasitic actions. *Id.* at 545. In rejecting the challenge, the Court gave effect to the plain words of the statute, which at that time simply provided that "Suit may be brought and carried on by any person." *Id.* at 546. Following the Court's decision in *Hess*, Congress amended the FCA by creating what would come to be referred to as the "government knowledge bar," which barred all *qui tam* actions "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (superseded).

Then, in 1984, the "reverse" *Hess* came in *United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100 (7th Cir. 1984). In *Dean*, the Government knew about the allegedly fraudulent claims for Medicare reimbursement the defendant-doctor had submitted because the relator, the State of Wisconsin, acting pursuant to statutorily-imposed duty, had reported the fraud to the U.S. Department of Health and Human Services. *Id.* at 1104. Nevertheless, as this Court did in *Hess*, the Seventh Circuit in *Dean* gave effect to the plain language of the statute: "Although Congress's immediate concern in enacting the 1943 amendment was to do away with the 'parasitical suits' allowed by Hess, the language and effect of the 1943 amendment in fact [wa]s much broader." *Id.* The relator's action was dismissed. *Id.* at 1107.

Then, in 1986, Congress amended the statute again, creating the original source provision that is at issue in this case. The result here should be no different than in *Hess* and *Dean*: the plain language of the statute should govern. Simply put, Rockwell's formulation, whatever its policy merits, is better directed to Congress than to the Court:

> As the Supreme Court stated in [*Hess*] when it refused to create the jurisdictional bar that Congress later provided by the 1943 amendment to the False Claims Act: "The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the [state] thinks Congress should have done rather than at what it did . . . . But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not."

Dean, 729 F.2d at 1106-07 (quoting *Hess*, 317 U.S. at 546-47).

Rockwell contends that it is permissible to reassess the original source's "information" at every stage of the litigation "[b]ecause § 3730(e)(4) is jurisdictional in nature." Pet. Br. 28-29.[21] Rockwell is incorrect. First, although § 3730(e)(4)(A) refers to "jurisdiction," the application of the original source provision following the Government's intervention does not

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[21] In the cases Rockwell cites on this point, Pet. Br. 29, the plaintiffs, unlike Mr. Stone, voluntarily dismissed the very causes of action that conferred jurisdiction and went forward on other, different claims. *See Wellness Cmty.-Nat'l* v. *Wellness House*, 70 F.3d 46, 48-49 (7th Cir. 1995); *Boelens* v. *Redman Homes, Inc.*, 759 F.2d 504, 506, 512 (5th Cir. 1985). In *Hafter*, 190 F.3d at 1165 n.10, also relied on by Rockwell, Pet. Br. 29, the court merely noted that it did not need to discuss claims that were not mentioned in the Second Amended Complaint to assess the relators' direct and independent knowledge. None of this is relevant here. From the beginning, Mr. Stone's claims included pondcrete and spray irrigation, and he never dropped either claim from the case. JA 287, 289; CA App. 210-11, 218, 221.

actually implicate the court's subject-matter jurisdiction. *See United States ex rel. Fallon* v. *Accudyne Corp.*, 97 F.3d 937, 940-41 (7th Cir. 1996) (Easterbrook, J.); *United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97, 102 n.5, 103 & n.7 (3d Cir. 2000) (Alito, J.) (citing *Fallon*).[22]

Where, as here, a relator has been determined to be an original source and the Government later intervenes, there is no reason to revisit the original source determination. Indeed, to revisit the original source determination in these circumstances would be an extra-statutory event, and could only properly be denoted a motion for reconsideration, which was not (and could not be) made here. *See, e.g., Servants of the Paraclete* v. *Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (motion to reconsider is warranted only upon an intervening change in controlling law, emergence of new evidence previously unavailable, or need to correct clear error or prevent manifest injustice).

Moreover, even were a court to reconsider a relator's original source status post-trial on the theory that it is a matter of subject-matter jurisdiction, Rockwell's argument would still fail. Subject-matter jurisdiction is assessed based upon the

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[22] The Tenth Circuit rejected this argument, holding that "[i]ntervention . . . does not automatically endow the court with subject-matter jurisdiction over both the claims by the United States and by the relator." Pet. App. 12-13a. This was error. The case on which the Tenth Circuit principally relied, *Federal Recovery Services, Inc.* v. *United States*, 72 F.3d 447, 450 (5th Cir. 1995), dealt with the entirely separate question of whether a relator who has been dismissed from an action on original source grounds can later seek to re-join the action to obtain attorneys' fees, pursuant to § 3730(d), from a settlement between the Government and defendant. That situation is not present in this case.

facts *as they existed at the time the complaint was filed, and not after trial. See Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) ("In applying the jurisdictional bar here by looking to the facts existing when Keene filed each of its complaints, the Court of Federal Claims followed the longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'") (quoting *Mullan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987) ("Subject-matter jurisdiction 'depends on the state of things at the time of the action brought'; if it existed when the suit was brought, 'subsequent events' cannot 'ous[t]' the court of jurisdiction.") (Scalia, J., concurring in judgment) (citations omitted); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) ("To be entitled to removal under § 1441(d), [petitioners] must show that they are entities 'a majority of whose shares or other ownership interest is owned by a foreign state.' [31 U.S.C.] § 1603(b)(2). We think the plain text of this provision, *because it is expressed in the present tense*, requires that instrumentality status be determined at the time suit is filed.") (emphasis added).[23]

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[23] Similarly, a post-filing change in a party's citizenship will not destroy diversity jurisdiction. *See Freeport-McMoRan, Inc.* v. *K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam) ("[D]iversity of citizenship is assessed at the time the action is filed."); *see also Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004) ("To our knowledge, the Court has never approved a deviation from the rule articulated by Chief Justice Marshall in 1829 [in *Conolly* v. *Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829)] that "where there is no change of party, a jurisdiction depending on the condition of a party is governed by that condition, as it was at the commencement of the suit."). The same rule applies to the amount in controversy requirement. *See Klepper* v. *First*

The Tenth Circuit also correctly rejected Rockwell's argument that Mr. Stone was required to have direct and independent knowledge of actual false claims submitted to the Government to obtain payment. As the Tenth Circuit held, the "plain text of the FCA . . . belies this interpretation; the FCA is clear that for a relator to be an original source he need only possess 'direct and independent knowledge of the *information on which the allegations are based.*'" Pet. App. 20a (emphasis in original). *See also Hafter*, 190 F.3d at 1162.

Rockwell's argument is an incorrect reading of *Mistick*, 186 F.3d 376. Rockwell reads *Mistick* as requiring a relator to have direct and independent knowledge of the false statement itself, as well as the true state of facts. Pet. Br. 32-33. But it is not clear that this is what *Mistick* holds, and certainly nothing in the text of the FCA supports this reading. In particular, subsection (e)(4)(B) nowhere provides that the requisite knowledge be of the actual misrepresentation itself. Moreover, the relator in *Mistick* "acknowledge[d] that 'the misrepresented facts were discovered by Mistick . . . pursuant to'" the FOIA request. *Id.* at 385. The Third Circuit therefore held that the relator was not an original source because it learned of defendants' alleged misrepresentations from a FOIA request

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American Bank, 916 F.2d 337, 340 (6th Cir. 1990) ("In a federal diversity action . . . , [w]hen determining whether the amount in controversy has been satisfied, we examine the complaint at the time it is filed. Jurisdiction, once established, cannot be destroyed by a subsequent change in events.") (citations omitted). It also is well established that the existence of federal question jurisdiction does not depend on the viability of the merits of the cause of action pleaded, except in limited circumstances not applicable here. *See Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946).

and civil discovery in a state court action – both not at issue here. *Id.* at 383, 385.

Indeed, if Rockwell's view of *Mistick* were to become the standard, the original source provision effectively would be read out of the FCA. No engineer or other "shop floor" employee like Mr. Stone would qualify as an original source because he would have no opportunity to learn of the actual false claims. Meanwhile, lawyers and compliance workers, whose jobs assembling certifications and sending out submissions for payment to the Government vest them with knowledge of false claims, would be ineligible for original source status under Rockwell's standard because they would be relegated to the back office and consequently unaware of the true state of facts on the shop floor. This result is not mandated by the language of the statute and also conflicts with the statute's purpose. It should be rejected.

D. Rockwell's Position as to the Significance or Amount of "Information" a Relator Must Possess To Be an Original Source Also Finds No Support in the Statute

Rockwell's proposed additional requirement of a certain significance or quantum of information an original source must possess likewise conflicts with the statutory text.

Rockwell appropriately concedes that "§ 3730(e)(4)(B) does not expressly require that the relator's information be sufficient to sustain the core allegation of fraud." Pet. Br. 35. But Rockwell nonetheless recommends an extra-textual standard on the theory that "any other standard would be subjective and difficult to apply at the outset, where it is typically not clear what the significance of certain information will be." *Id.* Rockwell then offers that "[c]ourts have described the necessary quantum of evidence in various ways, sometimes referring to 'essential,' 'substantive,' or 'core' information, but they are in general agreement that the information must have meaningful *evidentiary* value in

establishing the alleged fraud." *Id.* (internal citation omitted; emphasis added). There are two major problems with this argument.

First, as already noted, when it enacted subsection (e)(4)(B), Congress did not use any of the words Rockwell now offers; Congress instead used the phrase "the information on which the allegations are based." Rockwell suggests that this means "essential elements" or "core" or "substantive" information – all terms Congress knows how to use and indeed has used in other contexts. *See, e.g.*, 42 U.S.C. § 1320a-7a (essential elements); 12 U.S.C. § 4805 (core information); 31 U.S.C. § 6104 (substantive information). As this Court has said on more than one occasion, Congress knows how to choose language to achieve a desired result. *See, e.g.*, *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress says in a statute what it means and means in a statute what it says there.") (citation omitted); *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 524 (1994) ("Congress clearly knows how to use mandatory language when it so desires.").

Next, Rockwell argues that a relator must have direct and independent knowledge of *all* elements of the fraudulent transaction. Pet. Br. 31. Rockwell's argument cannot be squared with the use of the word "allegations" in the statute itself. *See Springfield*, 14 F.3d at 656-57 ("On the basis of plain meaning, then, we find that § 3730(e)(4)(B) does not require that the *qui tam* relator possess direct and independent knowledge of all of the vital ingredients to a fraudulent transaction."). Moreover, Congress *did* use one such phrase – "essential elements" – elsewhere in the *qui tam* provisions, but tellingly *not* in the provision in which Rockwell seeks to add those non-textual words. *See* 31 U.S.C. § 3731(c); *see also Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion.") (citation omitted).[24]

Second, a related statutory provision, which Rockwell ignores entirely, speaks clearly to the issue of the significance or amount of information an original source must possess in a way that completely contradicts Rockwell's argument. Section 3730(d), which addresses a successful relator's entitlement to a percentage of any monetary recovery, makes clear that Congress treated the question of the amount of information an original source possesses not as a particular threshold to be satisfied to bring suit but rather as one factor among others in determining – *as between the Government and the relator* – the relator's particular share of the recovery along a sliding scale of ranges from 0% to 30%. Thus, Rockwell's argument that the relator's knowledge must prove the FCA violation is plainly wrong. Pet. Br. 32.

Specifically, §§ 3730(d)(1) & (2) assign a sliding scale of possible awards for successful *qui tam* relators according to the level of the relator's contribution to the case. Both provide for a main recovery range for the relator and both provide for

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[24] Of course, Rules 8, 9(b), 11, and 12 of the Federal Rules of Civil Procedure, among others, provide vehicles for a defendant to challenge the legal sufficiency of the allegations in a complaint. But that is not what the FCA provides. *See United States ex rel. Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005) ("[A]lthough Fed. R. Civ. P. 9(b) requires qui tam plaintiffs to plead fraud with particularity, this inquiry is separate from the original source inquiry under § 3730(e)(4)."); *Cooper* v. *Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566-67 (11th Cir. 1994). Indeed, Rockwell challenged the legal sufficiency of Mr. Stone's original complaint under Rules 9(b) and 12(b)(6), and the motion was denied. CA App. 101-04.

attorneys' fees. Paragraph (1) has one additional provision that paragraph (2) lacks, however, providing that "[w]here the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in" one of the fora also enumerated in subsection (e)(4)(A), the court may award an "appropriate" sum of no more than 10%.[25]

Thus, according to the statute, if the action is "primarily based" on publicly disclosed information and the relator did not provide that information, the relator, who must be an original source under subsection (e)(4), *see Merena*, 205 F.3d at 105, may receive only 0% to 10% of the recovery. The precise amount of recovery depends on "the significance of the information" and "the role of the person bringing the action in advancing the case to litigation." In other words, in discussions between the relator and the Government *after* there is a recovery, a relator whose action is primarily based on information of which he does not have direct and independent knowledge is possibly given a smaller portion of the recovery (unless he played a major "role . . . in advancing the case to litigation"), but his original source status is clearly intact.

The legislative history contradicts Rockwell's alternative reading decisively. Representative Berman, the House sponsor of the 1986 amendments, explained § 3730(d)(1) this way:

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[25] Rockwell correctly notes that the courts below have not determined the amount of attorneys' fees to be awarded Mr. Stone as prevailing party in this case. Contrary to Rockwell's contention, however, the statute does not require a relator to be an original source to receive "reasonable attorneys' fees and costs."

> If the Government comes into the case, the person is guaranteed a minimum of 15% of the total recovery *even if that person does nothing more than file the action in federal court.* This is in the nature of a "finder's fee" and is provided to develop incentives for people to bring the information forward. The person need do no more than this to secure an entitlement to a minimum 15%. . . . The only exception to this minimum 15% recovery is in the case where the information has already been disclosed and the person qualifies as an "original source" but where *the essential elements* of the case were provided to the government or news media by someone other than the qui tam plaintiff. In that case, the court may award up to 10% of the total recovery to the qui tam plaintiff.

132 Cong. Rec. 29322 (Oct. 7, 1986) (emphasis added), *quoted in Merena*, 205 F.3d at 106; *see also id.* ("A person is an original source if he had *some* of the information related to the claim which he made available to the government . . . in advance of the false claims being publicly disclosed.") (emphasis added).[26]

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[26] The comments of Senator Grassley, the Senate sponsor, are to like effect: "[A] 10-percent cap is placed on those 'original sources' who bring cases based on information already publicly disclosed where only *an insignificant amount of that information stemmed from that original source*." 132 Cong. Rec. 28580 (Oct. 3, 1986) (emphasis added); *see also id.* at 20536 (Aug. 11, 1986).

Thus, if the question of the significance and amount of information possessed by a relator can be dealt with flexibly at the award stage, it cannot be that Congress intended the same issue to be dealt with in a contradictory manner at an earlier stage in the case. *See Smith* v. *United States*, 508 U.S. 223, 233 (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute.") (quoting *United States Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (applying "central tenent of interpretation" that a statute is to be considered in all its parts when construing any one of them). To quote Rockwell quoting this Court in *Hess*, "Congress could have 'provided specifically for the amount of new information which the informer must produce to be entitled to the reward,' but it did not do so." Pet. Br. 21. Rockwell's invitation to set an artificial minimum threshold that is not found in the statutory provision at issue should be rejected.

E. The History of the Statute Supports Mr. Stone's Plain Language Reading

The *qui tam* provisions reflect the important balance that Congress struck in 1986 between encouraging private enforcement of the FCA and preventing truly "parasitic" lawsuits. Since its initial enactment in 1863, the FCA has been substantively amended twice: in response to the *Hess* decision in 1943, and then again in response to a series of decisions, most notably *Dean* in 1984.[27] As relevant here, when Congress

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[27] As noted earlier, following *Hess*, Congress amended the FCA's *qui tam* provisions to bar all *qui tam* actions "based on evidence or information the Government had when the action was brought." Pub. L. No. 78-

amended the FCA in 1986, the government knowledge bar was specifically identified as one reason why the *qui tam* provisions had been rendered largely ineffective as a mechanism to fight government contractor fraud. The Senate sought to address this problem "to make the False Claims Act a more effective weapon against Government fraud." S. Rep. No. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

Indeed, the amendments ultimately enacted reflected the Senate's view that the "overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits." *Id.* at 23-24, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89; *see also* 132 Cong. Rec. 29321 (Oct. 7, 1986). Among the provisions added were a provision increasing monetary awards, § 3730(d)(1)-(2); a provision adopting a lower burden of proof, § 3731(c); and a provision allowing *qui tam* plaintiffs to continue to participate in their actions even after Government intervention, § 3730(c). Finally, Congress added back "the original source provision eliminated from the 1943 Senate bill," § 3730(e)(4). *S. Prawer*, 24 F.3d at 326.

What Rockwell characterizes as a "limited exception" to the jurisdictional bar, Pet. Br. 24, therefore, was actually a

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213, 57 Stat. 608, 609 (1943) (codified as 31 U.S.C. § 3729 *et seq.* (1982)) (superseded). The purpose of the "government knowledge bar" was to prevent parasitic lawsuits like the one in *Hess*. But it later became obvious that the language Congress adopted went much too far, which led to the 1986 amendments (and not judicial rulemaking). *See* S. Rep. No. 99-345, at 2-6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-71 (noting that the number of insiders willing to come forward with evidence of wrongdoing waned after passage of 1943 amendments).

major shift in Congressional policy. *See Hughes*, 520 U.S. at 950 ("In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued."). Congress recognized the difficulty of detecting fraud without the cooperation of people who observe the fraud, *see* S. Rep. No. 99-345, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269, and specifically sought to incentivize such insiders to come forward with what they know and bring suits on behalf of the Government, *see* 132 Cong. Rec. 29322 ("The law that we vote on today is intended to encourage a working partnership between both the Government and the qui tam plaintiff. The public will be well served by having more legal resources brought to bear against those who defraud the Government.") (statement of Rep. Berman).

Thus, the history of the 1986 amendments makes clear that its financial incentives are specifically intended "to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 99-345, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67 (1986). "[O]nly a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." *Id.* Indeed, this cooperation between the Government and relators has resulted in substantial revenues to the U.S. Treasury since the 1986 amendments. *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers $1.4 Billion in Fraud & False Claims in Fiscal Year 2005; More Than $15 Billion Since 1986 (Nov. 7, 2005), *available at* www.usdoj.gov/opa/pr/-2005/November/05_civ_595.html.

This case falls squarely within the statute's purpose. Mr. Stone voluntarily approached the Government in 1986 and provided the Government with his information. Mr. Stone continued to cooperate fully with the Government during the criminal investigation and, after he commenced this FCA action, worked cooperatively with the Government to bring this

case to trial. The jury's verdict confirmed Mr. Stone's allegations. Where, as here, the Government considers the relator an original source of a claim that, after all, is the *Government's* claim, there is no basis to deny the relator a share of the recovery that the defendant owes on account of proven fraud. Indeed, it would totally defeat Congress's purpose now – 17 years later – to deny Mr. Stone a share of the recovery brought about by his efforts.

II. THE COURTS BELOW CORRECTLY FOUND THAT MR. STONE IS AN ORIGINAL SOURCE

The district court's findings, as affirmed by the Court of Appeals, that Mr. Stone had direct and independent knowledge of the information on which he based his FCA allegations, and that he disclosed that information to the Government before filing suit, are subject to clear error review. *See Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985) (holding that clearly erroneous standard governing review of factual findings "does not entitle a reviewing court to reverse . . . simply because it is convinced that it would have decided the case differently"); *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, Supreme Court will not 'lightly overturn' the concurrent findings of the two lower courts.") (citation omitted).

A. Mr. Stone Had Direct and Independent Knowledge of the Information on Which His Allegations Were Based

The gravamen of Mr. Stone's original and amended complaints is that Rockwell knowingly hid ES&H violations in order to continue receiving award fee bonuses from the Government. JA 42-46; 402-15. As the courts below found, Mr. Stone had direct and independent knowledge of these allegations.

Pondcrete. The Tenth Circuit held that Mr. Stone had "direct and independent knowledge" of the information upon

which his allegations are based for three reasons: (1) Mr. Stone's duties as a Principal Engineer and, later, Lead Principal Engineer at Rocky Flats included "plant-wide 'troubleshooting' and reviewing designs and existing operations for safety and cost effectiveness," Pet. App. 17-18a; (2) Mr. Stone had personal knowledge of problems with Rockwell's pondcrete manufacturing process, *id.* 18-19a; and (3) Rockwell "forbade [Mr. Stone] from discussing any environmental problems at Rocky Flats with the DOE," *id.* 19a. This knowledge, gained while Mr. Stone worked at Rocky Flats, indisputably pre-dates any public disclosures. There is no basis to overturn these findings.

The Tenth Circuit found that Mr. Stone had communicated his concerns about the pondcrete manufacturing process in an October 13, 1982 Engineering Order. The court found that this document "was explicit in articulating his belief that the proposed design for making pondcrete was flawed: '*This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation . . . .*'" *Id.* 18a (emphasis added by Court of Appeals). Accordingly, the Court of Appeals held:

> Stone's knowledge that *a defective pondcrete manufacturing process* would be employed, gained from his review of Rockwell's plans, constitutes knowledge of information "underlying or supporting" his allegation concerning Rockwell's alleged ultimate fraudulent activity (the submission of claims to the DOE falsely stating that Rocky Flats was in compliance with environmental, health and safety laws).

Id. 21a (emphasis added). As the Tenth Circuit observed, "[d]espite [Mr. Stone's] warning, Rockwell went forward and manufactured pondcrete using the allegedly deficient procedure." Pet. App. 18a. The Engineering Order, which Mr. Stone wrote and provided long before any public

disclosures about the insolidity of Rockwell's pondcrete blocks, evidences Mr. Stone's direct and independent knowledge that the pondcrete process would not work *and* Rockwell's awareness that the process was flawed.

Mr. Stone's knowledge was further detailed in the affidavit he submitted in response to Rockwell's motion to dismiss and in the confidential disclosure statement he filed in conjunction with his original complaint, in which he explained that "the [pondcrete] piping system would not properly remove the sludge and would lead to an inadequate mixture of sludge/waste and cement, such that the 'pondcrete' blocks would rapidly disintegrate thus creating additional contamination problems." Pet. App. 19a; JA 290. Rockwell ignores this record evidence.

Instead, after conceding the issue below, *see supra* note 5, Rockwell now makes three arguments as to why it believes Mr. Stone did not have *sufficient* knowledge as to pondcrete. Pet. Br. 38-40. Each relies on the erroneous assumption that the touchstone of direct and independent knowledge is the trial evidence, not the allegations in the complaint, and each is meritless.

First, Rockwell argues that it is "implausible" to believe the piping system Mr. Stone reviewed could have caused pondcrete blocks to be insolid because human operators supervised the pondcrete manufacturing process. Pet. Br. 39. The Tenth Circuit correctly rejected this argument. Pet. App. 22a.

There simply is no basis in the record to say – and certainly no factfinder below has found – that the presence of human operators at Rocky Flats made deficiencies identified by Mr. Stone in the pondcrete manufacturing process implausible. In the pretrial order, plaintiffs asserted that "the pondcrete manufacturing equipment often was malfunctioning in a way that substantially impeded Rockwell's ability to produce an acceptable waste form" and that insolid pondcrete was caused

by an "incorrect cement/sludge ratio . . . as well as due to inadequate process controls and inadequate inspection procedures." JA 469-70. Neither plaintiffs nor defendants presented expert testimony at trial that purported to explain the cause or causes of the pondcrete insolidity. And that was not plaintiffs' trial burden on their FCA claim: the burden on plaintiffs, rather, was to prove that Rockwell knew that its manufacturing process would result in insolid pondcrete blocks and that Rockwell concealed that knowledge from the Government in order to continue receiving award fees. Plaintiffs met that burden, and Rockwell's appellate attempt to divine what the jury concluded as to the cause(s) of pondcrete insolidity must be rejected.

Rockwell's second argument, that Mr. Stone's piping theory was "proved wrong" at trial, Pet. Br. 39, is likewise without merit, even if relevant. None of the evidence adduced at trial demonstrating that some of the Rocky Flats foremen produced "concrete hard" pondcrete while others produced insolid pondcrete undermines the manufacturing deficiencies identified by Mr. Stone. Tr. 5177.[28] Mr. Stone knew that the

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[28] *See, e.g.*, Rockwell's Unusual Occurrence Report describing the failure of pondcrete blocks in 1988:

> The incorrect cement/sludge ratios in the pondcrete resulted from inadequate process control of varying solids concentrations in the sludge feed to the pug mill (where cement and sludge are mixed). Also a partially plugged star valve used to introduce cement to the mixer contributed to the incorrect ratio. . . . Operations in the Pondcrete processing area were discontinued pending investigation into the cause(s) of the occurrence and determination of corrective actions.

CA App. 1825-26.

process by which Rockwell intended to extract the sludge from the ponds was defective and would result in too much liquid. Rockwell's suggestion that this flaw has no relationship to inadequate cement and the subsequent leaching pondcrete is both illogical and wrong. Indeed, Mr. Fryback, one of the pondcrete foremen cited by Rockwell, Pet. Br. 40, made clear in his testimony that there were a number of potential causes for insolid pondcrete, including manufacturing defects. Tr. 990-92, 1037-38.[29]

Finally, Rockwell argues that Mr. Stone's criticism of the pondcrete manufacturing process does not establish Mr. Stone's direct and independent knowledge because "differences in engineering judgments" cannot be the basis for an FCA claim. Pet. Br. 40. This misses the point. Mr. Stone did not allege or seek to prove that Rockwell's process for creating pondcrete itself was fraudulent. Rather, plaintiffs proved at trial that Rockwell knew about problems with its pondcrete manufacturing process but hid them from the Government in order to obtain lucrative award fees. This is what the FCA requires, and this is what the jury found. No more is required for original source purposes. *See, e.g., Wang*, 975 F.2d at 1417 (holding that relator's assessment of

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[29] Rockwell places great emphasis on the trial testimony of pondcrete foremen Fryback, Tallman and Teel and plaintiffs' closing argument regarding pondcrete production. Pet. Br. 12, 40. The significance of such testimony was not solely the particular cement/sludge ratio but that Rockwell employees *concealed* leaking boxes from the Government. Tr. 1647-58, 1671-76, 4891-94, 4896-903.

engineering problems in the course of his employment satisfied the direct and independent knowledge requirement).[30]

Spray Irrigation. As Rockwell also conceded below, *supra* note 5, Mr. Stone also had direct and independent knowledge of the information on which his spray irrigation allegations was based, evidenced by, among other things, two documents Mr. Stone wrote while at Rocky Flats. The first document is a December 1, 1980 "Engineering Calculation Sheet" on the subject of "nitrate waste irrigation," which is based on Mr. Stone's observation of the existing spray irrigation system at Rocky Flats. CA App. 430-37; JA 224-25. The second document is a 1984 memorandum to Rockwell, in which Mr. Stone described the spray irrigation process as a "latent time bomb." JA 174, 226-27. These documents demonstrate that Mr. Stone was aware long before any public disclosures that Rockwell was employing a defective spray irrigation process that, if continued, would contaminate the environment. Mr. Stone also alleged that Rockwell engaged in "fraudulent practices" with respect to spray irrigation in his 1986 state court complaint. JA 270. Accordingly, the record

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[30] Rockwell also argues that Mr. Stone's knowledge cannot be "direct" because he no longer was employed at Rockwell when the pondcrete blocks actually slumped on the outdoor pads. As the Tenth Circuit held, that Mr. Stone was not physically present on those pads is "immaterial to the relevant question, which is whether he had direct and independent knowledge of the information underlying his claim, in this case Rockwell's awareness that it would be using a defective process for manufacturing pondcrete." Pet App. 21a. Mr. Stone knew Rockwell was producing faulty pondcrete and knew that such failure would lead to environmental contamination. Certainly, a defendant cannot fire a whistleblower, continue to engage in the same fraudulent conduct and avoid liability on that basis.

amply demonstrates that Mr. Stone had direct and independent knowledge that Rockwell's spray irrigation practices were defective and were contaminating the environment, and that Rockwell knew this and concealed that fact in order to continue to receive award fees.

Rockwell focuses its entire brief on pondcrete, leaving to a footnote the assertion that "[a]ll spray irrigation allegations corresponded to time periods as to which the jury found for Rockwell. It would do Stone no good to establish original source status as to the spray irrigation theories, as that would merely establish jurisdiction over claims he lost at trial." Pet. Br. 9 n.5 (internal citation omitted). Rockwell is wrong for at least three reasons. *First*, as already noted, the original source provision is determined by reference to the relator's knowledge of the information on which the *allegations* are based; the jury verdict, even if clear (which it is not here), is irrelevant to that question. *Second*, plaintiffs' spray irrigation allegations *did* include the time periods as to which the jury found against Rockwell. *Compare* JA 548-49 (verdict form) *with* JA 410-11 (amended complaint). *Third*, as discussed further below, it is wrong as a matter of law to say that plaintiffs "lost" their spray irrigation claim at trial.

At trial, Mr. Stone and the Government focused on proving that Rockwell made false statements to DOE in order to obtain award fees, regarding a variety of ES&H problems, including pondcrete and spray irrigation. A lengthy period of discovery and subsequent decisions about what evidence to present at trial, some of them made "at the Government's behest for tactical litigation reasons," JA 570, led to a natural narrowing of the claims asserted in the amended complaint. No claim "morphed," as Rockwell asserts. Pet. Br. 28. In the original complaint, amended complaint and pre-trial order, Mr. Stone consistently alleged that Rockwell hid ES&H problems from the Government in order to obtain fees. That is the same theory articulated in Count One of the Amended Complaint, an FCA count that included both spray irrigation

and pondcrete, and that is what Mr. Stone and the Government proved to the jury at trial.

Rockwell next speculates as to what evidence *may* have convinced the jury of Rockwell's liability, but as the Tenth Circuit has observed, parties cannot speculate regarding the factual basis for the jury's findings regarding liability or damages. *See* Pet. App. 31a, *discussing Midwest Underground Storage, Inc.* v. *Porter*, 717 F.2d 493 (10th Cir. 1983). The verdict form split Rockwell's liability into time periods based on the different award fee periods for which Rockwell obtained payments from the Government; it was not organized by theory or claim and does not mention pondcrete or spray irrigation; and damages were not broken down by time period. JA 548-49. Indeed, as noted above, the actual damage figure the jury chose corresponds to the dollar to the fees Rockwell was awarded for its "Waste Management" performance, which encompasses both pondcrete and spray irrigation. Pet. App. 30a. Accordingly, even if the jury verdict were relevant to the original source analysis (and it is not), it would still be the case that if Mr. Stone qualifies with respect to either his pondcrete or spray irrigation allegations (and he does), this Court should affirm.

As shown, Mr. Stone's knowledge of his pondcrete and spray irrigation *allegations* – not trial evidence – easily satisfies the Tenth Circuit's standard (which is faithful to the statute), as well as those standards articulated by other courts of appeals (to the extent they even differ). He satisfies the standard in the D.C. Circuit requiring knowledge of "any essential element of the underlying fraud transaction," *Springfield*, 14 F.3d at 657; the standard in the Third Circuit requiring knowledge of "the most critical element of [the relator's] claims," *Mistick*, 186 F.3d at 388; the standard in the Eighth Circuit requiring knowledge of "the true state of the facts," *Minnesota Ass'n*, 276 F.3d at 1050; the standard in the Ninth Circuit requiring "first-hand knowledge of the alleged fraud," *United States ex rel. Aflatooni* v. *Kitsap Physicians*

Servs., 163 F.3d 516, 525 (9th Cir. 1999); and the standard in the Eleventh Circuit requiring knowledge of "information [that] is potentially specific, direct evidence of fraudulent activity," *Cooper*, 19 F.3d at 568 n.12 (11th Cir. 1994). *See also* Stone Br. in Opp. 19-23.

To the extent any of these standards requires knowledge of fraud, Mr. Stone meets that test too. Mr. Stone knew that Rockwell's award fees were contingent on acceptable ES&H performance and he observed that Rockwell continued to receive fees despite its many ES&H deficiencies. Moreover, Mr. Stone's knowledge of the true state of facts – that Rockwell's plans for pondcrete would not work and that Rockwell's spray irrigation practices were contaminating the environment – were based on his review of Rockwell's pondcrete plans and spray irrigation practices. That Mr. Stone did not know of each individual piece of paper representing a false claim is of no moment, as he knew that the true state of affairs as to Rockwell's environmental performance was not being reported to the Government while Rockwell was continuing to receive lucrative bonuses. *That is knowledge of fraud.* And, significantly, Mr. Stone reported Rockwell's fraud to the Government over the course of a series of meetings between 1986 and 1988 – well before *any* facts became public – and this led to the Government's investigation of Rockwell. Mr. Stone meets any original source test.

As this Court has held, it "cannot undertake to review concurrent findings of fact by two courts below in the absence of *a very obvious and exceptional showing of error.*" *See Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (declining to reconsider the ultimate conclusion reached by the courts below after a three-week trial and review of a lengthy and complex record) (*quoting Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (emphasis added)). No such showing has been made here, and, accordingly, the Court should affirm.

B. Mr. Stone Provided the Information on Which His Allegations Were Based to the Government Before Filing Suit

Mr. Stone also easily satisfies the second prong of subsection (e)(4)(B), which requires a *qui tam* plaintiff to have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). As the Tenth Circuit noted, "the United States did not contend in the district court that Mr. Stone failed to make the necessary disclosures to the government." Pet. App. 51a n.5. Indeed, there can be no question here that Mr. Stone voluntarily provided all of his information to the Government before filing suit.

Rockwell misguidedly argues that Mr. Stone did not provide his information "voluntarily" inasmuch as he also discussed *other* topics and provided *other* documents to the Government. Pet. Br. 45-47. This argument makes no sense. Rockwell reads in the word "voluntary" a "requirement that the relator present the information in a manner designed to inform the Government of the salient facts." *Id.* 45-46. The statute requires no such thing. Indeed, the authorities Rockwell cites relate to "disclosure" requirements, *id.* 47, which have nothing to do with the original source provision; § 3730(e)(4)(B) only requires that the information be "provided." The voluntariness requirement thus merely ensures that the relator has gone to the Government to provide his information of his own free will, and not as the result of a subpoena or other compulsory process, *see United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326, 340 (3d Cir. 2005), or as required by the terms of his employment, *see United States ex rel. Fine* v. *Chevron, U.S.A.*,

Inc., 72 F.3d 740, 745 (9th Cir. 1995). It does not require the relator to emphasize any one item in particular while meeting in confidence with Government agents.[31]

It is undisputed that Mr. Stone first approached the Government in 1986 and that, in March 1988, Mr. Stone provided the FBI with documents related to pondcrete, spray irrigation and the award fee process. JA 180-81, 598, 600, 619-21. Mr. Stone also discussed pondcrete, spray irrigation and the award fee process with the Government in the 1986-88 meetings. *Id.* 181-82, 599-601, 615-21.

In reaching its decision that Mr. Stone is an original source, the Tenth Circuit looked closely at Mr. Stone's 1982 Engineering Order. Noting the district court's finding on remand that this document had been turned over to the FBI in March 1988, the Court of Appeals reaffirmed its earlier decision that the Engineering Order "was explicit in articulating [Mr. Stone's] belief that the proposed design for making pondcrete was flawed," Pet. App. 51a, and thus held that by turning it over to the Government, Mr. Stone had

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[31] Rockwell also argues that the quantity of documents Mr. Stone turned over to the Government was so great that they were in fact unhelpful. Pet. Br. 46-47. This makes no sense. In effect, Rockwell is claiming that Mr. Stone should have provided the Government with *less* information than he did. For its part, the Government has never made such a claim. In truth, Mr. Stone provided the documents he had, and he answered the questions the Government posed to him during their meetings truthfully and honestly. JA 599. He did not "bury" anything. It was impossible for Mr. Stone to know, prior to filing suit, much less prior to discovery and trial, which of the documents he provided would be used to prove his claims to a jury. Nor, as a dismissed employee, could he possibly have had in his possession all of the ultimate trial exhibits.

carried his burden of persuasion with respect to subsection (e)(4)(B)'s requirement that the relator's information be provided voluntarily. *Id.* 52a.

Mr. Stone also discussed his knowledge that Rockwell was improperly disposing of wastes via spray irrigation. JA 181-82, 599-601, 615-21. The December 1, 1980 Engineering Calculation Sheet relating to irrigation system design criteria; the 1984 memoranda in which Mr. Stone warned a Rockwell manager that ground water control "is a latent time bomb"; and the 1986 state court complaint, which discusses the 1980 Engineering Calculation Sheet in conjunction with Mr. Stone's allegations of Rockwell's "fraudulent practices," were all provided by Mr. Stone to the FBI in March 1988. JA 600-01, 606-08, 619-21.[32]

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[32] Mr. Stone and Rockwell are in agreement that the Second and Ninth Circuit standard requiring a would-be original source to be the source *to the public discloser*, *see United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Wang*, 975 F.2d at 1418, should be rejected on the ground that it renders the original source provision essentially superfluous. *See* Pet. Br. 49. But, contrary to Rockwell's contention, if this Court were to adopt the Second and Ninth Circuit approach, Mr. Stone is still an original source because he provided some of the information used by Agent Lipsky to procure the search warrant for Rocky Flats – a point Rockwell concedes. JA 97; Pet. Br. 4. Additionally, in the Sixth and D.C. Circuits, a relator must inform the Government of the alleged fraud before the information has been publicly disclosed, even if the relator is not the source of the public disclosure. *See United States ex rel. McKenzie* v. *Bell South Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997); *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997). This rule finds no support in the text of the statute either. Nevertheless, if this Court were to adopt it, Mr. Stone clearly is still an original source as he disclosed his information to the Government prior to the search warrant and the press coverage that followed.

C. Should the Court Adopt a Different Standard Than Used By the Courts Below, It Should Remand

There is ample evidence in the record with respect to both aspects of the original source provision to warrant affirmance with respect to pondcrete and spray irrigation. As noted above, this Court should accord deferential weight to the district court's original source findings. *See Anderson*, 470 U.S. at 573; *Cromartie*, 532 U.S. at 242. If, however, the Court disagrees with the standard applied by the Tenth Circuit, Mr. Stone respectfully submits that the Court should remand for a determination under the standard imposed by the Court. *See, e.g., Georgia* v. *Ashcroft*, 539 U.S. 461, 491 (2003) (remanding for reexamination of the facts under new standard Court announced regarding propriety of state legislative redistricting plan); *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 393 (1992) (remanding to apply new standard for modifying consent decrees); *see also United States* v. *Bestfoods*, 524 U.S. 51, 73-74 (1998) (remanding to permit lower court to make more concrete findings as to contested issue that had not been focused on previously).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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